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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA

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8 VALLIER WILLIAM TOMPKINS,

Case No. 3:16-cv-00444-MMD-WGC

9 Petitioner,

ORDER

10 v.

11 WARDEN BACA, *et al.*,

12 Respondents.
13

14 **I. INTRODUCTION**

15 In this habeas corpus action, brought by Nevada prisoner Vallier William
16 Tompkins, the respondents have filed a motion to dismiss. The Court will grant that
17 motion in part and deny it in part, as is explained below.

18 **II. BACKGROUND**

19 On July 3, 2012, Tompkins was charged by complaint, in a Reno justice court,
20 with three counts of sexual assault, one count of battery with intent to commit sexual
21 assault and one count of burglary. (See Criminal Complaint, Exh. 15 (ECF No. 22-15).)
22 The justice court ordered a competency evaluation. (See Order for Competency
23 Evaluations, Exh. 16 (ECF No. 22-16).) Two competency evaluation reports concluded
24 that Tompkins was competent to stand trial, and the state district court made a finding to
25 that effect. (See Competency Evaluation, Exh. 17 (ECF No. 22-17); Competency
26 Evaluation, Exh. 19 (ECF No. 22-19); Order of Competency and Returning Matter to
27 Justice Court, Exh. 21 (ECF No. 22-21).) Tompkins waived the preliminary hearing.
28 (See Waiver of Preliminary Examination, Exh. 24 (ECF No. 22-24).) On September 13,

1 2012, the State charged Tompkins by information with three counts of sexual assault.
2 (See Information, Exh. 23 (ECF No. 22-23).) Tompkins was arraigned on September 20,
3 2012, and he pled guilty to each of the three sexual assault charges. (See Transcript of
4 Arraignment, Exh. 25 (ECF No. 22-25); see also Guilty Plea Memorandum, Exh. 26
5 (ECF No. 22-26).) On October 25, 2012, the court sentenced Tompkins to three
6 consecutive terms of ten years to life in prison (with the first term running concurrent
7 with a sentence imposed in a separate case). (See Transcript of Sentencing, Exh. 30
8 (ECF No. 23-4).) The judgment of conviction was filed on October 30, 2012. (See
9 Judgment, Exh. 31 (ECF No. 23-5).) Tompkins did not appeal from the judgment of
10 conviction.

11 On July 11, 2013, Tompkins filed a petition for writ of habeas corpus in the state
12 district court. (See Petition for Writ of Habeas Corpus, Exh. 39 (ECF No. 23-13).) The
13 court appointed counsel for Tompkins. (See Order Granting *in Forma Pauperis* and
14 Appointment of Counsel, Exh. 41 (ECF No. 23-15); Recommendation and Order for
15 Appointment of Counsel, Exh. 42 (ECF No. 23-16).) On May 27, 2015, the state district
16 court granted the State's motion to dismiss, and dismissed the petition, determining that
17 the record showed each of Tompkins' claims to be meritless. (See Order Dismissing
18 Petition for Writ of Habeas Corpus, Exh. 63 (ECF No. 24-19).) Tompkins appealed, and
19 the Nevada Court of Appeals affirmed on February 17, 2016. (See Order of Affirmance,
20 Exh. 77 (ECF No. 24-33).) The remittitur issued on March 15, 2016. (See Remittitur,
21 Exh. 78 (ECF No. 24-34).)

22 This Court received a *pro se* petition for writ of habeas corpus from Tompkins,
23 initiating this action, on July 26, 2016 (ECF No. 4). The Court appointed counsel, and,
24 with counsel, Tompkins filed a first amended habeas petition on August 3, 2016. (See
25 Order entered July 27, 2016 (ECF No. 3); First Amended Petition for Writ of Habeas
26 Corpus (ECF No. 7).)

27 On June 19, 2017, Tompkins filed a second amended petition for writ of habeas
28 corpus — now his operative petition — asserting the following claims:

1 Ground 1: "Tompkins' guilty plea was not entered into knowingly,
2 intelligently, or voluntarily," in violation of his federal constitutional rights.

3 Ground 2: "Tompkins was denied his right to the effective assistance of
4 counsel," in violation of his federal constitutional rights.

5 Ground 2(1): "Trial counsel failed to advise Tompkins of his right to
6 appeal."

7 Ground 2(2): "Trial counsel failed to adequately investigate."

8 Ground 2(3): "Trial counsel failed to explain the nature and
9 consequences of the guilty plea to Tompkins."

10 Ground 2(4): "Trial counsel had a conflict of interest in representing
11 Tompkins."

12 Ground 2(5): "Trial counsel failed to object to highly prejudicial
13 victim impact evidence."

14 Ground 3: "Improper victim impact evidence was admitted against
15 Tompkins at his sentencing hearing," in violation of his federal
16 constitutional rights.

17 Ground 4: "The cumulative effect of the errors in this case deprived
18 Tompkins of his right to due process," in violation of his federal
19 constitutional rights.

20 (Second Amended Petition for Writ of Habeas Corpus (ECF No. 21).)

21 On August 18, 2017, respondents filed a motion to dismiss (ECF No. 30), arguing
22 that Tompkins' petition is barred by the statute of limitations, that none of Tompkins'
23 claims have been exhausted in state court, and that Ground 3 is barred by the
24 procedural default doctrine. (See Motion to Dismiss (ECF No. 30).) Tompkins filed an
25 opposition to the motion to dismiss on November 8, 2017 (ECF No. 36).

26 On November 21, 2017, Tompkins filed a declaration (ECF No. 39) stating that
27 he abandons Ground 2(2) of his second amended petition, his claim that his trial
28 counsel was ineffective for not properly investigating the case. The Court will, therefore,
dismiss Ground 2(2) on the ground that Tompkins has abandoned that claim.

Respondents filed a reply to Tompkins' opposition to their motion to dismiss on
December 15, 2017 (ECF No. 40). In their reply, respondents abandoned their
arguments based on the statute of limitations. (See Reply in Support of Motion to
Dismiss (ECF No. 40) at 1-2.)

1 **III. DISCUSSION**

2 A federal court may not grant habeas corpus relief on a claim not exhausted in
3 state court. 28 U.S.C. § 2254(b). The exhaustion requirement is based on the policy of
4 federal-state comity, and is intended to allow state courts the initial opportunity to
5 correct constitutional deprivations. See *Picard v. Conner*, 404 U.S. 270, 275 (1971). To
6 exhaust a claim, a petitioner must fairly present the claim to the highest available state
7 court, and must give that court the opportunity to address and resolve it. See *Duncan v.*
8 *Henry*, 513 U.S. 364, 365 (1995) (per curiam); *Keeney v. Tamayo-Reyes*, 504 U.S. 1,
9 10 (1992). A claim is fairly presented to the state court if, before that court, the petitioner
10 describes the operative facts and legal theory upon which the claim is based. See
11 *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard*, 404 U.S. at 275;
12 *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982).

13 In Ground 1, Tompkins claims that his guilty plea was not entered into knowingly,
14 intelligently, or voluntarily, because he “did not understand the nature of the charge;”
15 because he “believed he had an insanity defense to the crime;” because of his
16 “cognitive impairments and his psychiatric and other illness(es);” because he “did not
17 understand that other plea options may have been available to him” under *North*
18 *Carolina v. Alford*, 400 U.S. 25 (1970); because he “did not understand that he still had
19 the right to appeal;” and because the “trial court’s plea canvass was insufficient on
20 advising [him] of the rights he was waiving and the rights he was preserving by entering
21 into the plea agreement.” (Second Amended Petition at 6-8.) In state court, on the other
22 hand, Tompkins asserted that his plea was not knowing, intelligent and voluntary for
23 only two reasons: because the trial court did not advise him of his right to appeal and
24 because the trial court did not advise him of the possibility of an *Alford* plea. (See
25 Petition for Writ of Habeas Corpus, Exh. 39 at 10, 12 (ECF No. 23-13 at 11, 13);
26 Appellant’s Opening Brief, Exh. 69 at 4 (ECF No. 24-25 at 8).) To the extent of these
27 claims presented in state court, Tompkins’ Ground 1 has been exhausted. Tompkins did
28 not, however, assert in state court that his plea was not knowing, intelligent and

1 voluntary for the other reasons he claims in Ground 1. Accordingly, the Court finds that
2 Ground 1 is exhausted in part and unexhausted in part. Ground 1 is exhausted to the
3 extent that Tompkins claims that his plea was not knowing, intelligent and voluntary
4 because the trial court did not advise him of his right to appeal or the possibility of an
5 *Alford* plea; the remainder of Ground 1 is unexhausted. The Court will require Tompkins
6 to make an election—to abandon the unexhausted portion of Ground 1, or to move for a
7 stay of this action while he exhausts the unexhausted portion of Ground 1 in state court.
8 If Tompkins does not elect one of those options within the time allowed, this action will
9 be dismissed in its entirety pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982).

10 In Ground 2(4), Tompkins claims that his trial counsel was ineffective because of
11 a conflict of interest. (See Second Amended Petition at 13-14.) Tompkins asserted this
12 claim in state court. (See Petition for Writ of Habeas Corpus, Exh. 39 at 8 (ECF No. 23-
13 13 at 9); Appellant's Opening Brief, Exh. 69 at 3 (ECF No. 24-25 at 7).) Ground 2(4) is
14 exhausted. Respondents' motion to dismiss will be denied with respect to Ground 2(4).

15 In Ground 2(1), Tompkins claims that his trial counsel was ineffective for failing to
16 advise him of his right to appeal. (See *id.* at 9.) In Ground 2(3), Tompkins claims that his
17 trial counsel was ineffective for failing to explain the nature and consequences of the
18 guilty plea to him. (See *id.* at 11-13.) In Ground 2(5), Tompkins claims that his trial
19 counsel was ineffective for failing to object to highly prejudicial victim impact evidence.
20 (See *id.* at 14.) Tompkins did not assert these claims in state court. (See Petition for
21 Writ of Habeas Corpus, Exh. 39 (ECF No. 23-13); Appellant's Opening Brief, Exh. 69
22 (ECF No. 24-25); see also Opposition to Motion to Dismiss at 16 (conceding these
23 claims were not raised in state court).) However, any attempt to raise these claims in
24 state court now, by means of a second state habeas petition, would be procedurally
25 barred, as an untimely and successive petition. See NRS § 34.726, NRS 34.810.
26 Grounds 2(1), 2(3) and 2(5), then, are subject to dismissal as procedurally defaulted,
27 unless Tompkins can show cause and prejudice relative to the procedural default. See

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1 *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991); see also *Murray v. Carrier*, 477
2 U.S. 478, 496 (1986).

3 To demonstrate cause for a procedural default, the petitioner must “show that
4 some objective factor external to the defense impeded” his efforts to comply with the
5 state procedural rules. *Murray*, 477 U.S. at 488. For cause to exist, the external
6 impediment must have prevented the petitioner from raising the claim. See *McCleskey*
7 *v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner
8 bears “the burden of showing not merely that the errors [complained of] constituted a
9 possibility of prejudice, but that they worked to his actual and substantial disadvantage,
10 infecting his entire [proceeding] with errors of constitutional dimension.” *White v. Lewis*,
11 874 F.2d 599, 603 (9th Cir. 1989), citing *United States v. Frady*, 456 U.S. 152, 170
12 (1982).

13 Tompkins argues that ineffective assistance of counsel in his state habeas action
14 was cause for his procedural default of these claims. (See Opposition to Motion to
15 Dismiss at 16-23.) In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court ruled that
16 ineffective assistance of post-conviction counsel may serve as cause, to overcome the
17 procedural default of a claim of ineffective assistance of trial counsel. The Supreme
18 Court noted that it had previously held, in *Coleman*, that “an attorney’s negligence in a
19 postconviction proceeding does not establish cause” to excuse a procedural default.
20 *Martinez*, 566 U.S. at 15. The Court, however, “qualif[ied] *Coleman* by recognizing a
21 narrow exception: inadequate assistance of counsel at initial-review collateral
22 proceedings may establish cause for a prisoner’s procedural default of a claim of
23 ineffective assistance at trial.” *Id.* at 9. The Court described “initial-review collateral
24 proceedings” as “collateral proceedings which provide the first occasion to raise a claim
25 of ineffective assistance at trial.” *Id.* at 8. Here, the Court determines that Tompkins’
26 argument based on *Martinez* raises the question of the merits of Grounds 2(1), 2(3) and
27 2(5), and that, as a result, the matter of the procedural default of those claims will be
28 better addressed after respondents file an answer, and Tompkins files a reply. The

1 Court will deny respondents' motion to dismiss as to Grounds 2(1), 2(3) and 2(5),
2 without prejudice to respondents asserting their procedural default defense to these
3 claims, along with their position on the merits of the claims, in their answer.

4 In Ground 3, Tompkins claims that improper victim impact evidence was admitted
5 at his sentencing hearing, in violation of his federal constitutional rights. (See Second
6 Amended Petition at 15.) Respondents argue that this claim was ruled procedurally
7 defaulted in Tompkins' state habeas action, because such a claim cannot be raised in
8 Nevada in a post-conviction petition for writ of habeas corpus. (See Order of Affirmance,
9 Exh. 77 at 2 n.2 (ECF No. 24-33 at 3 n.2).) This amounted to an adequate and
10 independent state ground for the Nevada Court of Appeals' ruling on this claim. See
11 *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (procedural default doctrine applies
12 where state court clearly relies on procedure rule, and, in the alternative, reaches the
13 merits of claim); *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir.1992) (same). Therefore,
14 Ground 3, like Grounds 2(1), 2(3) and 2(5), is subject to dismissal as procedurally
15 defaulted, unless Tompkins can show cause and prejudice. Tompkins argues that he
16 can show cause and prejudice with respect to the procedural default of this claim on
17 account of his counsel's failure to inform him that he had a right to appeal, which is
18 essentially the claim made in Ground 2(1)). Here too, then, the Court determines that
19 Tompkins' argument that he can show cause and prejudice relative to his procedural
20 default of Ground 3 will be better addressed after respondents file an answer, and
21 Tompkins files a reply. The Court will deny respondents' motion to dismiss Ground 3,
22 without prejudice to respondents asserting their procedural default defense to that
23 claim, along with their position on the merits of the claim, in their answer.

24 In Ground 4, Tompkins claims that the cumulative effect of the errors in his case
25 deprived him of his right to due process in violation of his federal constitutional rights.
26 This cumulative error claim is exhausted and not procedurally defaulted to the extent
27 that Tompkins other claims are exhausted and not procedurally defaulted. Therefore,
28 respondents' motion to dismiss will be denied relative to Ground 4.

1 **IV. CONCLUSION**

2 It is therefore ordered that respondents' motion to dismiss (ECF No. 30) is
3 granted in part and denied in part. Ground 2(2) of petitioner's second amended petition
4 for writ of habeas corpus is dismissed. With respect to the unexhausted claims in
5 Ground 1 — all of Ground 1 except Tompkins' claims that that his plea was not
6 knowing, intelligent and voluntary because the trial court did not advise him of his right
7 to appeal or the possibility of an *Alford* plea — Tompkins will be required, within thirty
8 (30) days from the date of this order, to file either a notice stating that he abandons
9 those unexhausted claims or a motion for a stay of this action while he exhausts those
10 claims in state court. If Tompkins takes neither of those actions within the time allowed,
11 this action will be dismissed in its entirety pursuant to *Rose*, 455 U.S. 509. In all other
12 respects, respondents' motion to dismiss is denied.

13 It is further ordered that, if petitioner abandons the unexhausted claims,
14 respondents will have sixty (60) days from the filing of the notice of abandonment of
15 those claims to file an answer, responding to all petitioner's remaining claims.

16 It is further ordered that, if petitioner files a motion for stay, respondents will have
17 thirty (30) days to respond to that motion, and then petitioner will have twenty (20) days
18 to file a reply.

19 It is further ordered that, in all other respects, the schedule for further
20 proceedings set forth in the order entered September 20, 2016 (ECF No. 13), will
21 remain in effect.

22 DATED THIS 8th day of March 2018.

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25 MIRANDA M. DU
26 UNITED STATES DISTRICT JUDGE
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